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NEGLIGENCE AND LIABILITY WITHOUT FAULT IN TORT LAW

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It is frequently assumed that with a few exceptions the principles of negligence comprise the field of tort law, and that fault is the most common basis for determining liability for harmful conduct. The space devoted in most law school torts casebooks suggests to students and future lawyers that negligence is the dominant principle of tort law.[1] The emphasis given the subject by teachers, stimulated by the intellectual challenges of defining proximate cause or establishing standards of care, further impresses the importance of negligence principles upon each class of law students. Moreover, most of the tort cases litigated are in fact decided pursuant to principles of negligence, largely because of the litigation-spawning capacity of automobile accidents.[2] Though these are changing times, the concept persists that what now exists has always been. However, a survey of tort law produces a somewhat different view, and discloses a surprising number of instances in which liability is imposed without fault.

The conclusion reached by most scholars is that until the 19th century a person whose actions caused harm to another was in most situations held responsible for that harm simply because he had acted.

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1. Prosser devotes in excess of 500 of 1150 pages in his casebook to negligence concepts, W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS (4th ed. 1967); W. SEAVEY, P. KEETON & R. KEETON, CASES ON TORTS (2d ed. 1964) devotes about 450 of its 1043 pages to negligence principles; and C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS (1959) likewise gave about 450 of 1299 pages to negligence concepts.

2. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 11.3, Supplement to Volume 2, Comments to 11.3 n.1, to 11.3 n.8 (1956); O'Connell, *Taming The Automobile*, 58 Nw. L. Rev. 299, at 303-04 (1963).

Holdsworth tells us that this was the case both with respect to early Anglo-Saxon law[3] and the Mediaeval Common Law.[4] Wigmore earlier summarized the primitive German doctrine that "The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer . . . ."[5] This absolute responsibility, without regard to blame, persisted until the early 1500's, when the primitive notion was abandoned in favor of permitting a defendant to exempt himself from liability by showing that he was without blame even though he had acted voluntarily.[6] Street agreed that for several hundred years the conception of negligence was unknown to the law of trespass; a defendant was liable if it was shown that damage had been done by the direct or immediate application of force, without regard to whether or not he was negligent.[7] Justice Holmes was persuaded that policy and consistency required rejection of the rule of strict liability, but recognized that the theory enjoyed the support of some lawyers of his time, and that the common law probably followed such a rule during what he called a period of dry precedent.[8] Scholars today agree that a rule of strict liability prevailed at the early stages of development of the common law, usually rendering an actor liable if he in fact caused injury to another.[9]

Escape from the rule of strict liability evolved and developed slowly, in typical common law fashion. There are a number of detailed accounts of this development.[10] Prominent among the early decisions is *The Case of Thorns*,[11] in which an action for trespass to real property was brought against a defendant who had cut a hedge of thorns, some of which fell upon plaintiff's land. While holding for the plaintiff, one of

3. 2 W. Holdsworth, A History of English Law 51 (3d ed. 1923).
4. 3 *id.* at 375-82.
5. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 317 (1894).
6. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441, at 442-44 (1894).
7. T. Street, Foundations of Legal Liability 74-78 (1906).
8. O. Holmes, The Common Law 89 (1881).
9. 2 F. Harper & F. James, The Law of Torts § 12.2 (1956); W. Prosser, The Law of Torts 144 (3d ed. 1964); J. Fleming, The Law of Torts 107, 290 (3d ed. 1965).
10. Winfield, *The Myth of Absolute Liability*, 42 Law Q. Rev. 37 (1926); Winfield, *The History of Negligence in the Law of Torts*, 42 Law Q. Rev. 184 (1926); Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441 (1894); O. Holmes, The Common Law 85-88 (1881).
11. 1466 Y.B. 6 Ed. 4, f.7a pl. 18.

the judges noted that the defendant had failed to allege that he could not have acted in any other way, or that he had done all in his power to keep the thorns from falling on plaintiff's land. This observation suggests that establishing such facts might have constituted a valid defense. One hundred and fifty years later a similar suggestion was made in a case holding liable a soldier whose gun accidentally discharged and injured the plaintiff.[12] But the examples given—"as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt"—indicate that liability would have been imposed upon an actor guilty of much less than what is today required to establish negligence.

And so things continued until the 19th century, with liability in trespass being imposed upon actors who had caused harm in a series of cases suggesting that inevitability of the accident and lack of any fault upon the part of the defendant would have constituted justification and a defense against liability.[13] Finally, three American courts, relying in large part upon dicta from earlier cases, announced the proposition that liability could not be imposed unless the actor were guilty of some fault or neglect.[14] Of the three, the decision of the Supreme Court of Massachusetts in *Brown v. Kendall*[15] became the most famous, and is now considered the leading case establishing the necessity of proving negligence in order to impose liability for accidental injury. Perhaps the decision has gained that position because of the esteem enjoyed by its author, Chief Justice Lemuel Shaw; more likely, its prominence derives from the fact that it clearly imposed the burden of proving negligence upon the plaintiff rather than leaving the absence of negligence something to be proved by the defendant, as the other two decisions suggested.[16] Several years later, in England, comprehensive

12. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616).
13. See the cases set out in the Appendix to Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, at 456-63 (1894). *See also*, O. HOLMES, THE COMMON LAW 85-88 (1881).
14. Vincent v. Stinehour, 7 Vt. 62 (1835); Harvey v. Dunlop, 39 N.Y.C.L.R. 193 (1843); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).
15. 60 Mass. (6 Cush.) 292 (1850).
16. In Vincent v. Stinehour, 7 Vt. 62, 65-66 (1835) the court said: "To prevent any

reviews of precedent led to a clear statement that, where an act causing harm is neither intentional nor negligent, there will be no recovery, even though trespass would have been the right form of action if one had been maintainable.[17] But even as late as 1959 an English trial court was called upon to determine that a complaint did not state a cause of action where it alleged an injury caused by the defendant without specifying that the harm was either intentionally or negligently inflicted.[18]

As early as the 14th century, however, liability for causing harm could be established in an action of trespass on the case by showing that the conduct of the defendant was negligent. This action was devised in order to provide a remedy for harm caused by misfeasance in the performance of an obligation which had been undertaken.[19] In time, trespass on the case came to lie for the doing of any unlawful act, provided the damage sustained was "consequential" rather than "immediate."[20] At that time it was fatal error to proceed by case if the harm had been immediately caused by the defendant;[21] however, shortly before the American courts developed the modern negligence principle, an English court decided that a plaintiff might make negligence the ground of an action on the case even where the injury had been "immediately" caused by a negligent act.[22] In effect, one could waive the trespass and sue for negligence. The effect of the mid-19th century American decisions was to merge the substantive law of trespass and case, and to impose upon plaintiffs who relied upon trespass

abuse of this protection [against liability for harm involuntarily occasioned], a person is accounted negligent or careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practiced, and if he might have prevented the accident." In Harvey v. Dunlop, 39 N.Y.C.L.R. 193, 195 (1843), the plaintiff had argued that the onus lay on the defendant to show that the injury had not been done wrongfully or carelessly. The highest New York court agreed, but concluded that the jury might have reached such a determination on the evidence.

17. Holmes v. Mather, [1875] L.R. 10 Ex. 261; Stanley v. Powell, [1891] 1 Q.B. 86.

18. Fowler v. Lanning, [1959] 1 All. E.R. 290 (Q.B.). Probably plaintiff's counsel was attempting to put on the defense the burden of showing freedom from fault.

19. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 429-34 (3d ed. 1923).

20. Blackstone, J., in Scott v. Shepherd, 1773. 3 Wils. 403, 95 Eng. Reprint 1124; 1 J. CHITTY, PLEADINGS 148 (16 Am. Ed. 1883).

21. Day v. Elwards, 5 I.R. 648, 101 Eng. Rep. 361 (K.B. 1794).

22. Williams v. Holland, 131 Eng. Rep. 848 (C.P. 1833).

theory the same burden which they formerly would have had to carry in an action on the case.[23]

Why the change took place must, of course, remain a matter of speculation. It has been suggested that Chief Justice Shaw may have been motivated by a desire to make the risk-creating enterprises of a developing industrial economy less vulnerable to liability than they had been under the earlier common law.[24] This suggestion has been countered with the observation that *Brown v. Kendall*, which Shaw used as the vehicle for changing the law, involved not industry but instead the actions of private persons engaged in separating two fighting dogs.[25] It seems unlikely that Chief Justice Shaw shrewdly selected the case in order to disguise the ends to be served by changing the law; but it seems equally unlikely that he could have written the decision without considering what the contemporary conditions of society suggested as appropriate standards for allocating responsibility for unintentionally caused harms.

Indeed, the common law trespass rule was probably well suited to the conditions which prevailed during its evolution. Most energy sources at that time were either human or familiar domestic animals; the implements used in labor and recreation were relatively uncomplicated devices operating on elementary mechanical principles. One who directly or immediately harmed another by his active conduct probably had departed from community standards of behavior much in the same way that one who is negligent today departs from the standard of the reasonably prudent man. Proof of "immediate" causation was then a satisfactory standard for allocating responsibility for harm. It did not have a disruptive effect upon society, and did not deter or misdirect otherwise desirable economic activity.

The development of industry and transportation using steam and other sources of power, and the development of new products and devices, changed the situation. One need only read a description of the operation of steam locomotives prior to adoption of the air brake to

23. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 366 (1951).
24. *Id.* at 368.
25. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade In A Tory Vein*, 50 CORNELL L.Q. 191, 205 (1965).

realize what costs might have been imposed upon railroads if liability for harm were to be determined by the common law trespass rule:[26]

> Down to the year 1868 the brake system remained very much as it was in 1830 when railways were first adapted to commercial operation. Even though detailed improvements covering structural items had been incorporated, the essential principles were the same. Those in charge of the locomotive had no direct control over the brake manipulation of the vehicles comprising the train. Communications between engineman on the locomotive who senses the danger and the brakeman in the cars who drew up the cables was effected by whistle signals in case of sudden emergency. The first action was to signal danger and to this signal the train crew was instructed to respond with celerity. Each operation required time and every second of time represented many feet of space.

Moreover, about the only safety measures which the railroads could use at crossings were warning signals by whistle and bell.[27] As one commentator colorfully put it some time ago:[28]

> Early railway trains, in particular, were notable neither for speed nor safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law.

Predictably, the reaction of the law was not strict condemnation of this activity which offered escape from the slow, uncomfortable and jolting transport by stage over mud-filled roads,[29] and which promised development of the nation's rich resources deposited over thousands of miles of virgin territory. The negligence standard provided a legal environment in which rail transportation could grow and prosper. It aided other branches of industry and commerce as well.

The judicial response to the question of the liability of one who causes harm by handling a new and relatively unknown material suggests a similar adaptation of law. *The Nitroglycerine Case* involved an explosion which occurred soon after "a gentlemen by the name of Noble" [sic] suggested that nitroglycerine might be used for blasting

26. SILCOX, SAFETY IN EARLY AMERICAN RAILWAY OPERATIONS: 1853-1871 (1936), quoted in Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 at 161 (1946) [hereinafter cited Malone].
27. *Id.*
28. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926).
29. *See* Malone, *supra* note 26, at 153-54.

purposes.[30] Employees of the defendant express company had undertaken with hammer and chisel to open a case, from which some unidentified "sweet oil" was leaking. The explosion which followed did severe damage to the building in which the express office was located. The defendants were not held liable for the harm done, even though it resulted "immediately" from the actions of the employees. Chief Justice Shaw's opinion in *Brown v. Kendall* provided the basis for holding that the directness or remoteness of the consequences of the defendants' act related only to the proper form of action, and not to the basis of liability. Negligence was the standard by which liability was to be determined. Coupled with the then prevailing notion that a manufacturer was not liable absent privity of contract,[31] the decision significantly aided preparation of the legal environment for an economy which would be producing and using new and unfamiliar products whose composition or principles of operation were not generally known.

The restructuring of the legal environment for the industrial age was not accomplished solely through reformulation of the rule concerning liability for trespass. As Professor Malone has effectively demonstrated,[32] the concept of contributory negligence as a bar to recovery rose to prominence in response to the need for a legal system compatible with the demands of a growing industrial economy. The unimpressive opinions in *Butterfield v. Forrestor*,[33] uniformly recognized as the fountainhead of contributory negligence theory, could hardly have prompted such widespread proliferation of the doctrine had it not been the case that some additional bar to recovery was considered necessary and appropriate to the times. The entire population stood to benefit from the workings of an industrial economy, and society could not afford to burden itself with compensating those individuals who were so unfortunate as to be injured accidentally by an instrument of progress.[34]

Thus it appears that a significant change in tort law was made by abandonment of the strict liability rule of common law trespass, and substitution of the principles of negligence law in cases involving un-

30. 82 U.S. (15 Wall.) 524, 529 (1872).
31. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).
32. Malone, *supra* note 26.
33. 11 East 59, 103 Eng. Rep. 926 (K.B. 1809).
34. *See* L. Green, Traffic Victims: Tort Law and Insurance 33-34 (1958).

intended consequences. That this change took place within the last one hundred and fifty years is in itself evidence that strict liability is not a principle alien to Anglo-American tort law. Perhaps even more persuasive evidence is the fact that strict liability is applied as the principle for determining responsibility for much harmful conduct within the area of tort law. Strong eddies and cross-currents developed in response to the changes in liability for unintended consequences, and, to extend the metaphor, it seems possible that the tide has begun to turn.

An example of strict liability derived from the early common law, but still of vitality, is the rule imposing liability upon one who intentionally enters onto land in the possession of another, even though under a reasonable mistake.[35] Of course, a distinction exists between consequences which are intended, though brought about by mistake, and consequences which are unintended. But the significant point is that liability may be imposed for trespass even though a reasonable man might have made the same mistake. Moreover, the liability of a trespasser extends to all harm which he in fact causes to the land, the possessor, or members of the possessor's household, without regard to whether the trespasser acted in a way which was intentionally wrongful, reckless, or negligent.[36] Perhaps the preservation of this rule of strict liability can be attributed to our unexamined retention of the early common law zeal for protecting interests in land; or perhaps no social purpose equivalent to that of freeing industry from judicial restraints has been advanced on behalf of trespassers to real property. The consequence is, at any rate, that one may be held liable for harm caused without fault other than entry based upon a reasonable mistake.[37]

35. 1 RESTATEMENT (SECOND) OF TORTS § 164 (1965); J. FLEMING, THE LAW OF TORTS 77-80 (3d ed. 1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 12-13 (1956); W. PROSSER, THE LAW OF TORTS 74 (3d ed. 1964).

36. 1 RESTATEMENT (SECOND) OF TORTS § 162 (1965); J. FLEMING, THE LAW OF TORTS 38 (3d ed. 1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 29 (1956); W. PROSSER, THE LAW OF TORTS 67 (3d ed. 1964).

37. Illustration 2 to § 162 of 1 RESTATEMENT (SECOND) OF TORTS is as follows:

> 2. A is driving his car along the highway in a neighborhood with which he is unfamiliar. He asks B to direct him to a certain town. B tells him that he can take a short cut through a private road over which the public is not accustomed to travel, which B asserts to be upon his own land but which, in fact, is on the land of C. While driving carefully along the road, A runs over D, C's three-year-old child, who suddenly dashes out from the bushes which border the road. A is

Strict liability is still imposed upon one who removes the naturally necessary lateral or subjacent support of land in the possession of another thereby causing subsidence of the land, both for damages to the land and for any damage to buildings or artificial conditions thereon.[38] In fact, Tentative Draft Number 15 of the *Restatement of Torts Second* recently proposed to increase this protection for support of land by imposing strict liability for subsidence of land caused by persons otherwise privileged to withdraw subterranean water, oil, minerals, or other substances from under the land.[39] Liability for harm caused by the subsidence of land which would not have taken place but for the weight of buildings upon it is determined by principles of negligence,[40] but the total picture is one of broad exposure of land excavators to strict liability. Again, the reason for the strict liability may be an unexamined retention of the common law's zealous protection of interests in land, but the result is that one may be held liable for unintended consequences caused without fault other than that of being the actor.

The early common law also recognized a strict liability for harm done by trespassing animals, although liability apparently could be avoided by surrender of the animals.[41] In time, this liability became personal to the possessor of the animals, and thus became more nearly a rule of strict liability comparable to those discussed previously. The applicability of this strict liability rule to conditions in the United States was a matter of some doubt during the formative stages of this nation, but today, even in jurisdictions in which it was judicially rejected, it has since found legislative acceptance in various forms of fencing statutes.[42] Once again, the appropriateness of strict liability seems to have turned upon how well the particular rule has suited the needs of the community, rather than upon any philosophical conclusion as to whether the possessor of an animal, for example, was guilty of fault.

subject to liability to D and to C.

38. 4 RESTATEMENT OF TORTS §§ 817, 820 (1939); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.27 (1956).

39. RESTATEMENT (SECOND) OF TORTS §§ 818 (Tent. Draft No. 15, 1969).

40. 4 RESTATEMENT OF TORTS §§ 819, 821 (1939).

41. O. HOLMES, THE COMMON LAW 1520-23 (1881). Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 325 *et seq.* (1894).

42. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 14.9 (1956).

There are other rules derived from early common law precedents which also may appropriately be considered rules of strict liability within the body of tort law. For example, a bona fide purchaser of stolen property is strictly liable to the true owner for its value, regardless of the care and prudence he may have exercised in ascertaining the title of the vendor.[43] This liability is imposed without regard for the relative fault of the owner in exposing the goods to the possibility of conversion.[44] Another rule of law holds a bailee liable for misdelivery of property, regardless of his good faith or his freedom from negligence.[45] Moreover, in order to avoid an otherwise insurmountable obstacle to recovery, the usual rule is that a bailor may establish a prima facie case simply by proving that he delivered the property, and that the bailee either failed to return it, or returned it in damaged condition.[46] The same reasoning underlay the common law rule, now embodied in the Interstate Commerce Act, making a carrier liable for damage to goods transported unless it can show that the damage was caused solely by an act of God, the public enemy, the shipper himself, a public authority, or by the inherent nature of the goods.[47] The consequence is that a carrier may be held liable even though it was guilty of no negligence. Except where modified by statute, a similar strict liability has been imposed upon hotels and innkeepers for the loss or destruction of the goods of guests.[48] It might be objected that these are rules of property law rather than tort law; but such an argument smacks too much of the fine analysis formerly applied in determining the correct form of action for obtaining redress for harmful conduct.

If instead one may avoid that perspective of the law, it seems quite certain that the strict liability effect of the *respondeat superior* doctrine is one of the most important principles of liability for tortious conduct. Early commentators described it as such,[49] and the fact that the doctrine

43. R. BROWN, THE LAW OF PERSONAL PROPERTY 231 (2d ed. 1955) [hereinafter cited as BROWN]; *See* UNIFORM COMMERCIAL CODE § 2-403.
44. BROWN, *supra* note 43, at 241-42. RESTATEMENT (SECOND) OF TORTS § 234 (1965).
45. BROWN, *supra* note 43, at 351; 1 F. HARPER & F. JAMES, THE LAW OF TORTS 156 (1956); W. PROSSER, THE LAW OF TORTS 88 (3d ed. 1964).
46. BROWN, *supra* note 43, at 359-75; RESTATEMENT (SECOND) OF TORTS § 328A, comment *b* (1965).
47. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).
48. BROWN, *supra* note 43, at 481-87. Innkeepers are afforded a greater opportunity than carriers to escape liability by showing freedom from negligence.
49. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383 (1894); 1 W. BLACKSTONE, COMMENTARIES 429-32 (17th ed. 1830).

seems to fit more neatly into the law of agency is no reason for deemphasizing its operative effects in the law of torts. The liability of an employer for the tortious conduct of his employee is a strict liability imposed without regard to the fault of the employer. It makes no difference how careful the employer is in recruiting his workers, how carefully he trains them, or how carefully he supervises their activities. If an employee commits a tort in the course of his employment, his employer is liable.

Another rule of liability without fault which is frequently considered an element of agency law, but which is also clearly a principle for determining liability for tortious conduct, is that imposing liability for harm done by carefully selected independent contractors performing non-delegable duties.[50] This liability is not simply a development of the strict liability imposed for engaging in abnormally hazardous activities, for it extends to activities which are not so classified.[51] Other principles of vicarious liability, such as the family car doctrine,[52] may likewise be considered to permit the imposition of liability for tortious conduct without proof of fault. While it is true that in many of these situations, someone has been at fault in bringing about the harm suffered, for present purposes the significant point is that liability may be imposed on one who was without fault.

The employment relationship offers other illustrations of liability without fault. For example, the obligation imposed in admiralty upon an employer of seamen, to furnish maintenance and cure for seamen who fall sick or are injured in the service of the vessel, is a strict liability imposed without regard to the fault of the employer.[53] Far from meeting disapproval in modern times, this principle has been codified by the Jones Act,[54] which broadens the rights of seamen. Moreover, the enactment of workmen's compensation acts throughout the United States reflects the conclusion that imposition of strict liabil-

50. *See* RESTATEMENT (SECOND) OF TORTS §§ 416-27B (1965).
51. *See* RESTATEMENT (SECOND) OF TORTS § 417 (1965) (Work done in a public place) § 418 (Maintenance of Public Highways) §§ 419, 421 (Repairs which a lessor is under a duty to his lessee to make) § 422 (Work on buildings and other structures on land) § 425 (Repair of a chattel supplied or land held open to the public as a place of business).
52. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1419-24 (1956).
53. *See* Calmar Steamship Corp. v. Taylor, 303 U.S. 525 (1938); The Osceola, 189 U.S. 158 (1903).
54. 46 U.S.C. 688 (1964).

ity upon employers is an appropriate way to deal with industrial accidents.[55]

Defamation is, of course, an intentional tort insofar as it requires an intention to publish the defamatory statement, but it is often illustrative of liability without fault. Except for constitutionally protected statements concerning public officials, public figures, and matters of public interest,[56] liability may be imposed because a statement, innocent on its face, was rendered defamatory by facts not known to the defendant nor discoverable by him in the exercise of reasonable care.[57] Liability may likewise be imposed even though the defendant did not intend to defame the plaintiff, and had no reason to know that his statement would be defamatory.[58] In short, one who publishes a defamatory statement will be held liable to one injured without regard to whether the publication could be said to be the product of fault.

An innocent misrepresentation made by a party to a business transaction may also give rise to liability irrespective of the good faith or reasonable belief of the defendant.[59] Prosser lists eighteen jurisdictions which have adopted this rule of strict liability, and suggests that in other jurisdictions such a rule is in fact applied, although disguised in the more traditional language of fraud through the use of presumptions or fictions concerning the defendant's state of mind.[60] The rule may also have been made effective with respect to the sale of securities by Section 17(a) of the Securities Act of 1933, and Rule 10b-5 of the

55. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 730-33 (1956); W. PROSSER, THE LAW OF TORTS 554-58 (3d ed. 1964).

56. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

57. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.5 (1956); W. PROSSER, THE LAW OF TORTS 791-92 (3d ed. 1964). A leading example is a Scottish case, Morrison v. Ritchie & Co., 39 Scot. L.R. 432 (1902), in which the defendant published as a routine social item a false report that plaintiff had become the mother of twins. Plaintiff had been married only a few weeks, but this was unknown to defendant. Defendant was held liable. Care or the lack of it went only to affect damages.

58. F. HARPER & F. JAMES, *supra* note 57, at § 5.7 (1956); W. PROSSER, THE LAW OF TORTS 791 (3d ed. 1964). A leading example is the case of Jones v. E. Hulton & Co., [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20, in which defendant published what it intended to be a fictitious account of immoral behavior of one Artemus Jones on the beach at Dieppe. A real Artemus Jones was held entitled to recover despite defendant's lack of intent to defame any living person.

59. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 7.7 (1956).

60. W. PROSSER, THE LAW OF TORTS 724-29 (3d ed. 1964).

Securities Exchange Commission's Regulations pursuant to the Securities Act of 1934.[61]

One of the more spectacular changes in tort law in recent years has been the adoption of a rule imposing strict liability upon sellers of defective products for the harm caused by the defect. Soon after the leading decision of the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors*,[62] this rule of strict liability was adopted in many other jurisdictions.[63] So swift was this change to the rule of strict liability that the reporter and council for the *Restatement (Second) of Torts* urged abandonment of a section approved in 1962 limiting such strict liability to products designed for intimate bodily use, and adoption of a broader version applicable to all products so that the *Restatement (Second) of Torts* would not be out of date when published.[64] The broader version later obtained the approval of the Institute, and now appears as Section 402A of the *Restatement (Second) of Torts*. This strict liability has been further extended to defects in housing produced by a mass developer of housing,[65] to the lessor of a rental truck,[66] and to the manufacturer of a demonstrator model for injuries received before purchase.[67] This general and rapid acceptance of strict liability reflects a judicial consensus that the rule is more appropriate to the present day economy than was the old rule, which imposed a burden upon the injured party to prove negligence on the part of the manufacturer or seller of the product.

There remains to be noted the strict liability imposed upon those who engage in extra-hazardous or abnormally dangerous activities. This is probably the type of strict liability which most readily comes to mind when the subject of strict liability is mentioned, perhaps be-

61. *See* Meisenholder, *Scienter and Reliance as Elements in Buyer's Suit Against Seller Under Rule 10b-5*, 4 CORP. PRAC. COMM. 27 (1963).
62. 32 N.J. 358, 161 A.2d 69 (1960).
63. *E.g.*, Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969). *See* PROSSER, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).
64. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 10, 1964).
65. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
66. Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).
67. Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir., 1964).

cause several generations of lawyers have now been exposed to torts courses in which this type of liability was discussed as a contrast to basic negligence principles. Traditional discussion of the subject begins with analysis of the decision in *Rylands v. Fletcher*,[68] even though the opinions in that case reveal that the judges had no intention of changing the law or providing remedies beyond those which had existed for centuries under English law. In any event, the principle of liability without fault applied in that case had a ready adaptability to cases involving harm caused by the powerful devices and products of an industrial age. Although a number of courts have avoided specific application of *Rylands v. Fletcher* to problems of this sort, in fact a principle of strict liability for extra-hazardous activities has become accepted doctrine in American law.[69] The original *Restatement of Torts* incorporated the principle of strict liability for what were called "ultrahazardous activities."[70] With a change of terminology to "abnormally dangerous activities"[71] and recognition that the liability should attach even though the activity might be perfectly safe if the utmost care were used,[72] this principle will be carried into the *Restatement (Second) of Torts*, where it will be extended even further to cover harm caused to property or persons on the ground by the ascent, descent or flight of any aircraft.[73]

In a number of respects, even liability imposed on a negligence basis is in fact a liability without fault. The standard of the reasonably prudent man is an objective standard which ignores many considerations which would be involved in determining whether there was moral or ethical fault on the part of the actor.[74] Deviations from that standard are made at the peril of the actor, as are the deviations from community standards which take place when one engages in abnormally dangerous activities. Certainly there is no moral fault on the part of a man who for more than 30 years has driven carefully and without accident, but

68. 3 Hurl. & C (Ex. 1865); [1866] L.R. 1 Ex. 265; [1868] L.R. 3 H.L. 330.
69. 2 F. Harper & F. James, The Law of Torts § 14.4 (1956); W. Prosser, The Law of Torts 523-32 (3d ed. 1964).
70. 3 Restatement of Torts §§ 519-24 (1938).
71. Restatement (Second) of Torts § 519 (Tent. Draft No. 10, 1964).
72. *Id.* at § 520.
73. *Compare* Restatement (Second) of Torts § 520A (Tent. Draft No. 12, 1966) *with* § 520A (Tent. Draft No. 11, 1965) and § 520A (Tent. Draft No. 10, 1964).
74. *See* Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 1 (1927).

who, distracted by concern for the health of his hospitalized wife, drives through a stop sign and collides with a person who had the right of way. Yet such a man would be deemed negligent because, considering only certain aspects of his conduct, he created unusual and unreasonable risks. Even insane persons are liable for negligently inflicted harm and their conduct is judged by the standard of the reasonably prudent man, although it is beyond their power to meet that standard.[75]

At times, allocation of the burden of proof in negligence cases may also impose liability upon one whose fault has not in fact been established. Thus the established principle that an unexcused violation of a criminal statute constitutes negligence per se places the burden of establishing excuse or justification on the defendant, with liability following if such is not established.[76] Even when the violation of the statute can never be excused—as with the Federal Safety Appliance Act,[77] for example—liability may be imposed although a total evaluation of the cirucumstances would lead to the conclusion that there was no fault. In some jurisdictions, the effect of *res ipsa loquitur* is to create a presumption of negligence which stands unless rebutted,[78] and hence supports liability where in fact there was no fault. Where the more usual version of the doctrine is followed, and *res ipsa loquitur* simply creates a permissible inference of negligence,[79] there is still the possibility that a jury will draw that inference where in fact there was no negligence.

CONCLUSION

This review of the field of tort law indicates that if regard is given to the various types of problems encountered, rather than the number of cases pending on court dockets, strict liability is applied more often than negligence as the principle which determines liability. It is neither a mere vestige of primitive law, as indicated by its recent judicial

75. RESTATEMENT (SECOND) OF TORTS § 283B (1965).
76. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.6, at 1010-11 (1956); W. PROSSER, THE LAW OF TORTS § 35, at p. 202 (3d ed. 1964).
77. O'Donnell v. Elgin J. & E.R.R., 338 U.S. 384 (1949), *rehearing denied* 338 U.S. 945 (1950).
78. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.11 (1956); W. PROSSER, THE LAW OF TORTS, 232-39 (3d ed. 1964).
79. *See* authorities in note 78, *supra.*

and legislative applications, nor a new and untried development. It is a principle with adaptability to serve the needs of society in a variety of situations. Apparently no set formula can be derived as to when strict liability constitutes the appropriate principle of liability, but some observations may be made about certain common features of the situations in which strict liability is applied.

One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience[80] is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.

Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard.[81] Superior knowledge and difficulties of proof are frequently mentioned as justifications for application of the *res ipsa loquitur* doctrine.

Another common feature of situations in which strict liability is imposed is that the conduct giving rise to liability is not one which it would be socially desirable to prohibit or enjoin, so that the giving of a remedy to a plaintiff threatened with harm must be delayed until

80. *See* RESTATEMENT OF TORTS § 520 (1939).
81. *See, e.g.*, Traynor, J., concurring in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

harm has actually occurred. This is certainly the case with abnormally dangerous activities, the keeping of domestic animals, the removal of lateral or subjacent support for land, the publication of statements or views which may be defamatory, and the flight of aircraft over land.

Another very important common feature is that strict liability serves a compensatory function in situations where the defendant is, or through the use of insurance may become, the financially more responsible person. Certainly this underlies the strict liability of the *respondeat superior* principle, the family car doctrine, and other vicarious liabilities. It is also true of a manufacturer's liability and the liability of one engaging in abnormally dangerous activities, and is generally true of common carriers and innkeepers (rather than shippers or guests), as well as those who engage in excavating activities which remove lateral or subjacent support. The consequence of imposing such liability in these situations is usually to pass the cost of the beneficial activities on to those who enjoy its benefits.

A number of the situations in which strict liability is imposed involve a type of conduct which can be defined with sufficient precision to ensure that application of a strict liability principle will not produce miscarriages of justice in a substantial number of cases. This is apparent with respect to those who engage in abnormally dangerous activities, manufacturers, persons who remove lateral or subjacent support, the keepers of domestic animals, shippers, bailees, innkeepers, bona fide purchasers of stolen property, publishers of defamatory statements, and persons violating statutes.

If the activity involved is one which can be defined with sufficient precision, that definition may serve as an accounting unit to which the costs of the activity may be allocated with some certainty and precision. Precise definition of an accounting unit makes it possible to use actuarial techniques for accumulating loss experience, thus rendering the activity appropriate for service by insurance institutions.

Of course, not all activities to which these general observations might apply are now governed by a rule imposing strict liability for harm. Automobile accident claims settlement and litigation is a prime example of an area to which the principle of strict liability might be applied with benefit, but in which negligence standards still prevail.

The problems of proof involved in automobile accident litigation

under a negligence standard are so great that it is only blind optimism in a large number of cases to hope that what in fact occurred will become known. Modern highway traffic situations may attach critical significance to such factors as lines and markers painted on a road surface, relative positions of rapidly moving vehicles, presence and color of steady or flashing lights, and very short time intervals. On-the-scene observations are ordinarily made by untrained persons, who were not prepared for the event which transpired. The event may have been so shocking that it had effects upon both their psyche and memory. Moreover, the determination is not based upon what these untrained persons in fact observed, but instead turns upon what they remember of what they observed perhaps two or three years earlier. Even these memories do not control the final judicial decision, because that depends upon what jurors can remember perhaps two or three days after having heard the poorly remembered and conflicting accounts of witnesses, who may have been neither articulate nor precise in their use of language. As with a number of other situations in which strict liability provides an appropriate rule, one may be able to say confidently only that the parties were engaged in a particular activity—*i.e.*, the use of motor vehicles.

Given the values of our society, high speed traffic is a necessity of the day. It cannot be prohibited, and those threatened by it must await harmful injury before seeking a remedy. The owner of an automobile has by its acquisition demonstrated a financial capacity making it possible for him at least to purchase insurance to absorb any loss caused by its operation. So much of our affluence is devoted to automobiles, there is little doubt that, taken as a whole, the activity can afford to bear all the costs of harm which are factually connected with it. If insurance is made compulsory its cost becomes a cost of transportation, and thus is passed on to those who benefit from the use of automobile transportation. The activity involved—the use of motor vehicles—is one which can be defined with sufficient precision to ensure that strict liability will not be imposed unjustly in any significant number of cases. Finally, it is an activity for which there is a wealth of statistical data, making it possible to use the actuarial techniques which facilitate the use of insurance.

It should be no surprise, then, that in recent years a number of proposals have been made to deal with the problem of distributing

the costs of automobile accidents upon some basis other than fault.[82] This is not the proper occasion to review or evaluate these various plans, or to determine whether the optimal scheme would be to impose strict liability without regard to fault or to utilize some type of accident insurance. But it may be said with a certain confidence that, in the foreseeable future, some principle or principles of liability without fault will substantially replace the principles of negligence law in automobile accident claims settlement and litigation. When this occurs, the principles of negligence will have lost the dominant position they now occupy in tort law due to the frequency of automobile accidents.

82. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962); A. EHRENZWEIG, FULL AID INSURANCE FOR THE TRAFFIC VICTIM (1954). For a description of these and other proposals, see R. Keeton and J. O'Connell, *supra*, at 124-219. For a contrary view, see W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW SUBJECT (1965), first published in 31 U. CHI. L. REV. 641 (1964).